

**United States Court of Appeals
For the Ninth Circuit**

O. H. BENGSTON, as Administrator of the Estate of
PHINICE VAN PELT, Deceased, *Appellant*,

vs.

ANDREW NESHEIM, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

HULLIN & EHRLICHMAN
By JOHN A. ROBERTS, JR.
Attorneys for Appellee

614 United Pacific Building,
1000 Second Avenue,
Seattle 4, Washington,
MU. 2-2852.

United States Court of Appeals
For the Ninth Circuit

O. H. BENGSTON, as Administrator of the Estate of
PHINICE VAN PELT, Deceased, *Appellant*,
vs.
ANDREW NESHEIM, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

HULLIN & EHRLICHMAN
By JOHN A. ROBERTS, JR.
Attorneys for Appellee

614 United Pacific Building,
1000 Second Avenue,
Seattle 4, Washington,
MU. 2-2852.

INDEX

	<i>Page</i>
I. Jurisdiction	1
II. Statement of Facts.....	1
III. Questions Presented	3
IV. Summary of Argument.....	3
V. Argument	4
A. Statutes of limitation are generally consid- ered to be procedural, governed by the law of the forum; limitation periods prescribed by wrongful death statutes are an exception	4
B. The tolling provision of O.R.S. 12.150 or R.C.W. 4.16.180 are not applicable.....	6
VI. Conclusion	9

TABLE OF CASES

<i>Burns v. White Swan Mining Co.</i> , 35 Ore. 305, 57 Pac. 637	8
<i>Erie v. Thompkins</i> (1938) 304 U.S. 64, 82 L.Ed. 1188	6
<i>Hansen v. Hayes</i> (1944) 175 Ore. 358, 154 P.(2d) 202	5
<i>Harrisburg, The</i> , 119 U.S. 199, 30 L.Ed. 358.....	6
<i>Laidlow v. Oregon Railway and Navigation Co.</i> (C. A. 9, 1897) 81 Fed. 876.....	6
<i>McClagherty v. Rogue River Electric Company</i> (1914) 73 Ore. 135, 154, 140 Pac. 54, 144 Pac. 569..	5
<i>Richardson v. Pacific Power and Light Company</i> (1941) 11 Wn.(2d) 288, 188 P.(2d) 895.....	5, 9

TEXTBOOKS

16 Am. Jur. 115, §171.....	7
132 A.L.R. 292, 295.....	7-8

STATUTES

Oregon Revised Statutes §12.150.....	3, 6, 7, 8
§30.020.....	2, 3, 5, 7
Revised Statutes of Washington §4.16.180.....	3, 7
28 U.S.C. §1291.....	1

United States Court of Appeals

For the Ninth Circuit

O. H. BENGSTON, as Administrator of the Estate of PHINICE VAN PELT, Deceased, <i>Appellant</i> ,	} No. 15822
vs.	
ANDREW NESHEIM, <i>Appellee</i> .	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

I. JURISDICTION

The appellee adopts the statement of jurisdiction contained in the appellant's brief on file herein and in addition represents that under the provisions of Title 28 U.S.C., Section 1291, this Court has authority to review the decision of the District Court.

II. STATEMENT OF FACTS

The admitted facts necessary to a determination of this appeal are enumerated in the District Court's ORDER ON MOTION FOR SUMMARY JUDGMENT (Tr. 14, 15) and are the following:

(1) On January 17, 1955, PHINICE VAN PELT was drowned in the Chetko River in the State of Oregon.

(2) Approximately *two years and three weeks* after the death of said PHINICE VAN PELT, the plaintiff commenced this action against the defendant ANDRE NESHEIM in the United States District Court for the Western District of Washington alleging that negligence of said defendant was the proximate cause of the death of the said PHINICE VAN PELT.

(3) At all times pertinent to this action, there was in full force and effect in the State of Oregon the following statute:

“O.R.S. 30.020. Action by personal representative for wrongful death. When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the decedent, for the benefit of the surviving spouse and dependents, and, in case there is no surviving spouse or dependents, then for the estate of the decedent, may maintain an action against the wrongdoer for any injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therefor shall not exceed \$20,000.00 which may include recovery for all reasonable expenses paid or incurred for funeral, burial, doctor, hospital and nursing services for the deceased.”

(5) That the defendant departed from the State of Oregon to the State of Washington at a time less than two years before the plaintiff commenced this action.

While the above are considered the essential facts from the appellee's point of view, it is readily admitted that the remaining evidentiary matters referred to in the Appellant's brief under the caption STATEMENT OF THE CASE (Appellant's brief 3, 4) are like

wise before this court as they were before the District Court.

III.

QUESTIONS PRESENTED

(1) Does the Complaint allege a cause of action created by the Oregon Wrongful Death Statute?

(2) Is the existence of the right of action, created by the statute, co-extensive with the two-year limitation period prescribed by the statute?

(3) Within the purview of the Conflict of Laws field, what effect, if any, do the tolling provisions of O.R.S. 12.150 (Tr. 12) and R.C.W. 4.16.180 (Tr. 13) have on the limitation period prescribed in O.R.S. 30.020 (Tr. 6, 11, 15).

IV.

SUMMARY OF ARGUMENT

It cannot be disputed that the appellant's cause of action is one that was unknown to the common law and would not have existed except for the express provisions of the Oregon Wrongful Death Statute. The appellee respectfully submits that the tolling provisions of O.R.S. 12.150 and R.C.W. 4.16.180 have no effect whatever on the two year limitation period prescribed by O.R.S. 30.020 for the reason that the statute creating the right, by its express language, limited the time of existence of the right and as such constitutes an exception to the rules of applicability of general statutes tolling limitation periods. Inasmuch as the plaintiff's Complaint was filed after the running of the period of limitations, it is submitted that the right to bring the action no longer existed and that the order of the Dis-

trict Court dismissing the same was proper and should be affirmed by this Court.

V.

ARGUMENT

The principal legal dispute involved herein is whether or not the law of the State of Oregon (*lex loci*), or the law of the State of Washington (*lex fori*), relating to statutes of limitation and the timing thereof, should be considered and applied to the instant factual situation.

A. Statutes of Limitation Are Generally Considered to be Procedural, Governed by the Law of the Forum. Limitation Periods Prescribed by Wrongful Death Statutes Are an Exception.

It is accepted as academic and undisputed that the general rule in common law actions is that the foreign jurisdiction will apply the substantive law of the jurisdiction in which the action arose and the procedural law of the forum. It is further undisputed that in the usual common law action, the time in which the cause may be brought is generally regarded as a matter of procedure and, therefore, governed by the law of the forum.

The rule with regard to the procedural aspects of periods of limitation on the right to bring an action is contrary, however, where a statutory enactment creates the right of action unknown to the common law, and includes within its express terms a limitation of time in which to assert the right. In this situation, the law of the forum is not applied for the reason that the limitation period is a condition of the substantive right created by the statute.

(1) An action for wrongful death was unknown to the common law and to the law of the State of Oregon until the legislative enactment of the fore-runner of O.R.S. 30.020. In *Hansen v. Hayes* (1944) 175 Ore. 358, 154 P.(2d) 202, the Oregon court clearly and specifically states that a new legal right, unknown to the common law, was created by the enactment of this section. In *McClagherty v. Rogue River Electric Company* (1914) 73 Ore. 135, 154, 140 Pac. 64, 144 Pac. 569, the Oregon court announced that such statutes creating a liability for causing death, while not to be strictly construed, are not to be extended by implication, as they are in derogation of the common law.

In *Richardson v. Pacific Power and Light Company* (1941) 11 Wn.(2d) 288, 188 P.(2d) 895, relied on by the appellants herein, the Supreme Court of the State of Washington, at page 301 of the decision, noted with interest that the particular portion of the Oregon wrongful death statute being construed in the *Richardson* case had been amended by the Oregon State Legislature. In considering "extensions by implication," it is here noted with considerable interest that the Oregon State Legislature has not seen fit to delete or in any way amend the two year limitation period prescribed by that statute.

(2) Where statutory enactments, such as O.R.S. 30.020, create a cause of action and provide by their terms a limitation of time in which to bring such an action, it is a well defined law that the limitation of time provision is not remedial or procedural but is inescapably welded to the substantive right created by

the statute. Accordingly, after the time has elapsed, the right is gone, or conversely, “the limitation accompanied the obligation everywhere.” The rule of law was first announced in this country in the landmark case, *The Harrisburg*, 119 U.S. 199, 30 L.Ed. 358, cited numerous times in all jurisdictions including the State of Oregon which gave rise to the decision in *Laidlow v. Oregon Railway and Navigation Co.* (C.A. 9, 1897) 81 Fed. 876. In construing the Oregon state law, this Court stated that the time for commencement of a wrongful death action is of the essence of the right and the right is lost if the time is disregarded. The doctrine of *Erie v. Thompkins* (1938) 304 U.S. 64, 82 L.Ed. 1188, cited in the appellant’s brief at page 11, is not in conflict with this rule.

(3) The appellant has not and cannot seriously contest the foregoing legal principles and actually concede, that as an exception to the general rule, the forum will usually apply the limitational period contained in the foreign wrongful death statute (Appellant’s brief, 5).

In essence, therefore, the appellant’s sole argument before this Court is that the enforcement of the limitation period contained in the Oregon Wrongful Death Statute would be contrary to the public policy of the State of Washington.

B. The Tolling Provision of O.R.S. 12.150 or R.C.W. 4.16.180 Are Not Applicable to the Two-Year Limitation Prescribed by O.R.S. 30.020.

Before discussing appellant’s contentions in this regard, it should be noted that the entire record of this

cause including the record before this honorable Court contains no scintilla of evidence suggesting concealment or fraud on the part of the defendant. The record demonstrates that after the death of the decedent and before the expiration of two years thereafter, the defendant returned to the State of Washington.

(1) In considering the appellant's proposition that the two-year limitation period was tolled by the defendant's removal from the State of Oregon to the State of Washington, within the purview of the conflict of laws field, it is respectfully submitted that the plaintiff has confused the instant factual situation with that which exists in the usual common law cause of action. If we were here dealing with a common law tort action (such as decedent might have had, for the same acts complained of herein, had he survived) it is entirely probable that the tolling provisions of O.R.S. 12.150 or R.C.W. 4.16.180 might be applicable. However, we are not considering a common law cause of action.

In accordance with the general rule, O.R.S. 30.020 contains its own specific period of limitation, defining the period of time within which the right created by the statute shall exist.

The rule is stated at 16 Am. Jur. 115, Section 171, as follows:

"It is usually held that the provisions contained in a general statute of limitations suspending the operation of the statute of limitations during the absence of non-residence of the defendant from the state is not applicable to an action for wrongful death."

The numerous cases so holding are collected in annotations on the question at 67 A.L.R. 1070 and again at 132 A.L.R. 292. On page 295 of the latter annotation the reason the wrongful death limitation of action period is not tolled by the defendant's absence is stated as follows:

"It is held in most jurisdictions that since a wrongful death statute or a survival statute allowing damages for death creates a right of action which did not exist at common law or permits an action which abated at common law to survive, a provision therein limiting the time within which the action may be brought is technically not a statute of limitations, but is a condition of the right to maintain the action, which must be strictly complied with; and that such a limitation is independent of the general statute of limitations. Accordingly, it is held that, ordinarily, circumstances which by express provision or by implication toll the latter statute will not toll the limitation period in a wrongful death statute or a survival statute allowing damages for death, in the absence of a saving clause in the latter statute."

(2) It is noted that no such savings clause exists in the Oregon Wrongful Death Statute and while there is no case directly in point in that jurisdiction, it is clear that the Oregon courts follow the general rule in this regard. As early as 1899, the Oregon court announced its adherence to the general policy of the law in the case of *Burns v. White Swan Mining Co.*, 35 Ore. 305, 57 Pac. 637. In that decision the court was called upon to construe the application of the tolling provisions of O.R.S. 12.150 to a statute creating a mechanic's lien

which, by its terms, provided a limitation of time within which to assert the right thus created. In construing O.R.S. 12.150, the court announced that the section was intended to apply only to the common law rights of action, and that since a mechanic's lien was unknown at the common law, and of a statutory origin, the general statute of limitations had no application to it.

(4) The appellant apparently relies heavily on the decision in *Richardson v. Pacific Power and Light Company* (1941) 11 Wn.(2d) 288, 118 P.(2d) 895, which was not considered at the District Court level. A study of that decision, from the public policy standpoint, confirms the position taken by the appellee in this matter. In this regard, the following language of the court, found on page 299 of the decision is noted:

“It is the universal rule that the *existence* and *nature* of a cause of action for tort are governed by the law of the place where the alleged wrong was committed (citing authorities).” (emphasis supplied).

VI.

CONCLUSION

Under the Oregon Wrongful Death Statute, this action would have been barred and non-existent, if on the day it was filed in the United States District Court for the Western District of Washington, it had been filed in the courts of the State of Oregon. The general statute providing for the tolling of statutes of limitations in the State of Oregon has no application to the limitation period prescribed by the Oregon Wrongful Death Statute and it would be contrary to the public policy of the

State of Washington to allow the prosecution of a cause of action created by the Oregon law without considering the statute in its entirety, including the limitation on the right thus created. For this reason, the general Washington statute, providing under certain circumstances, for the tolling of Washington State's various statutes of limitation could not apply to the instant action.

Accordingly, the appellee was entitled to the relief granted by the District Court and that Court's Order on Motion for Summary Judgment, signed and entered on September 27, 1957, should be affirmed.

Respectfully submitted,

HULLIN & EHRLICHMAN
By JOHN A. ROBERTS, JR.
Attorneys for Appellee